IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 8993 of 2007

For Approval and Signature:

HONOURABLE MR.JUSTICE H.K.RATHOD

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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ARVINDSINGH JASHVANTSINH CHAUHAN - Petitioner(s)
Versus
STATE OF GUJARAT & 2 - Respondent(s)

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Appearance :

MR PRABHAKAR UPADYAY for Petitioner(s) : 1,
MR SHIVANG SHUKLA, A.G.P. for Respondent(s) : 1,
None for Respondent(s) : 2 - 3.

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CORAM : HONOURABLE MR.JUSTICE H.K.RATHOD

Date : 04/04/2007

ORAL JUDGMENT

1. Heard learned advocate Mr. Prabhakar Upadhyay appearing on behalf of petitioner and learned AGP Mr. Shukla appearing on behalf of

respondent – State Authority.

2. The grievance of the present petitioner is that he received a call letter dated 3rd February 2007 from the District Primary Education Officer, District Panchayat, Nadiad to remain present on 9th February 2007 between 10-30 am to 6-10 pm with original certificates and also one set of xerox. It was made clear in the said letter that if, petitioner will not produce original certificates along with original application, then, it should have to be presumed that petitioner is not interested in the post of Primary Teacher (Vidya Sahayaka).

3. According to petitioner, this letter was received about 11-00 am on 9th February 2007, but, there was a difficulty with him that he already filed application with original certificates at Kachchh – Bhuj for the post of Primary Teacher (Vidya Sahayaka) before that. So, the original certificates are lying at Kachchh – Bhuj, therefore, he was not able to produce the original certificates on 9th February 2007 before the District Primary Education Officer, District Panchayat Nadiad. Therefore, respondent authority has not accepted his application and request to extend the period for production of original certificate on 9th February 2007 has also been rejected by the respondents. Against which, present petition is filed by the petitioner.

4. In light of the aforesaid facts and looking to the fact that petitioner who is a candidate of post of Primary Teacher (Vidya Sahayaka) knowing fully well that when the advertisement issued by the Director of Primary Education for each District, such certificates are required to be made in any district by any candidate, he should have to produce the original certificates along with application. Then, in such circumstances, at the time, when the form has been filled up by the petitioner in response

to the advertisement issued by District Primary Education Officer, Kachchh – Bhuj, he should know that now, he will not be able to make any application to any other district in absence of original certificates as he had submitted the original certificates with his application for Primary Teacher (Vidya Sahayaka) in Kachchh – Bhuj district. Thereafter, the petitioner received a call letter from District Primary Education Officer, Nadiad District Panchayat gave some temptation to the petitioner that he will able to get the job in Nadiad. The policy has been framed by the State Government that in absence of original certificates, no persons should have to be taken or allowed to fill up the application as policy has been made applicable in the entire State of Gujarat. In respect to each District, no concession can be given to the petitioner to permit him to produce xerox copy of original certificates and no necessity to give further concession to extend the period for production of original certificates.

5. Recently, this Court has also considered the identical question in Special Civil Application No.7370 of 2007 and Special Civil Application No.7371 of 2007 dated 21st March 2007. The relevant observations made by this Court in Para 5 to 9 which are quoted as under :

> *"5. I have considered the submissions made by learned advocates appearing for the respective parties. Once the petitioners have submitted the application in Kachchh District in response to advertisement dated 25.1.2006 knowing fully well that his name was registered in employment exchange at Patan, why the petitioner has selected Kachchh district for making application, no reason has come out from the petitioner. The advertisement is very clear that petitioner shall have to*

supply original mark sheet and certificate to the concerned authority along with the application for the post of primary teacher. The consequences must be known to the petitioner that once this original certificates and mark sheets were supplied to the Kachchh district, then, petitioner is not able to make application to any other district in absence of original mark sheet and certificates. So, on 25.1.2007, on the same day, the petitioner was aware about the fact or both have decided that they will not file any application to other district because original certificates were produced at Kachchh district. At least, this result is known to the petitioners and their intention were also clear when application was made at Kachchh District. This difficulty arise only that from Patan District, employment exchange office sent the name of petitioners to the respondent No.2 which accepted the list names of petitioners and calling the petitioners to submit the application on 19.2.2007 along with original certificates. The contention raised by learned advocate, Mr.Kanabar, that procedure is different when name from employment exchange is called by respondent No.2. Such contention cannot be accepted simply on the ground that two mode of calling the name or receiving the applications from candidate; one is by advertisement and another is by calling the names from employment exchange. Therefore, there cannot be any different procedure to be followed by the respondent No.2 while examining the application received in response to the advertisement and one is received from employment exchange. There may not be any different standards of examining such

application. Meaning thereby that if application is made in response to the advertisement, then, original certificates must and if application is received due to sending the name from employment exchange, then, original certificate is not necessary. Such standard should not have to be applied. It itself suggestive of violation of Article 14 between similarly situated candidates and, therefore, the submissions made by Mr.Kanabar cannot be accepted. The respondent No.2 has acted fairly calling the applications because of the names of the petitioners were received from employment exchange; informing to the petitioners to produce the original certificates with application on 19.2.2007. The petitioner was not able to produce original certificate knowing fully well that his certificates were lying in Kachchh district. This difficulty was known in advance by the petitioner to the effect that after submitting the application in Kachchh District if petitioner wants to make application to another district, the original certificate must have to be produced by the petitioner. Now, to take sympathy from the respondent no.2 or from the Court to point out the difficulties, cannot be help to the petitioner. Initially, the petitioner wants the benefit of Kachchh District where standard of percentage is little less in comparison to other district. When he receives the letter dated 9.2.2007 from the respondent No.2 then he considered that in Patan District if the job is available it is better because he belonging to Patan. Such type of efforts cannot be entertained by this Court. When petitioner is not having legal and

enforceable right to ask the respondent to accept the application of the petitioner in absence of original certificates and to direct the respondent to consider the case of petitioner in absence of original certificates on merits. Such direction is contrary to the advertisement and procedure which has been prescribed by the respondent No.2 authority. Each and every candidate who has applied in response to the advertisement and whose names have been received from the employment exchange, has followed the procedure to produce the original certificate. Now the petitioner wants the exception because he applied at Kachchh District with original certificates. Such concession is not available in law to the petitioner. Article 226 is not meant for concession. It must be meant to enforceable of legal right, if any, by the petitioner. Two facts are necessary to have the remedy under Article 226. One is that petitioner must have to establish enforceable legal right and simultaneously respondent must be under legal obligation to act. If there is no legal obligation upon respondent No.2 to act according to procedure or according to prayer made by the petitioner, then also, writ of mandamus cannot be issued by this Court. Even in case of equitable obligation writ of mandamus is not maintainable under Article 226 of the Constitution of India. Therefore, contention raised by learned advocate, Mr.Kanabar, the respondent should have to wait upto 6.3.2007 to facilitate the petitioner to produce original certificate cannot be accepted as it is contrary to the recruitment process carried out by the respondents and this Court cannot direct any

statutory authority to act contrary to the policy and contrary to law.

6. Learned advocate, Mr.Kanabar, relied upon the decision in case of Excise Superintendent, Malkapatnam, Krishna District, A.P. (supra) wherein it is held that in recruitment process, the appropriate department should send requisition to employment exchange and also invite applications by publishing in newspaper etc. The candidates sponsored by employment exchange and those who have applied on basis of advertisement, both should be considered and it will subserve fair play, justice and equal opportunity. The Apex Court has not said that both should have to be considered differently. Here the case of petitioner have been considered by respondent No.2 giving opportunity to the pets to submit the application on 19.2.2007 along with original certificate. For that, petitioner failed to do so and now to make complaint against respondent No.2 that respondent No.2 has passed an order which is arbitrary, contrary to principles of fair play and justice and equal opportunity. Therefore, according to my opinion, aforesaid decision is not applicable to the facts of the present case.

7. Learned advocate, Mr.Kanabar, relied upon the another decision in case of Arun Kumar Nayak (Supra). In the aforesaid decision, the question which was examined by the Apex Court that initially names were called from employment exchange and subsequently post has been advertised by notification. That question was raised before the Apex Court to the effect that subsequent notification is bad. The

answer given by the Apex Court that subsequent notification is valid. It required to be circulated amongst all the eligible candidates and there is nothing wrong. Merely advertisement has been issued subsequent to the calling the names from the employment exchange. Therefore, this judgment is also not applicable to the facts of the present case. In the facts of this case, initially advertisement were issued and subsequently names called from the employment exchange according to GR dated 14.6.2006. Therefore, according to my opinion, none of the authority which has been relied upon by learned advocate, Mr.Kanabar, is applicable to the facts of this case.

8. Recently, this question has been examined by the Apex Court in case of Ashok Kumar Sonkar v. Union of India reported in 2007 3 Scale 517. Relevant observations made in Para.20 is quoted as under :

> *"20. Possession of requisite educational qualification is mandatory. The same should not be uncertain. If an uncertainty is allowed to be prevailed, the employer would be flooded with applications of ineligible candidates. A cut off date for the purpose of determining the eligibility of the candidates concerned must, therefore, be fixed. In absence of any rule of any specific date having been fixed in the advertisement, the law, therefore, as held by this Court would be the last date for filing the application."*

8.1 Recently also, the Apex Court has in

case of State of Bihar & Ors. v. Amarendra Kumar Mishra reported in 2006 AIR SCW 5051, in Para.14 to 17, observed as under :

> *"14. It may be true that the appointment letter was sent by ordinary post; but even in relation thereto a statutory presumption arises. It is also well known that postal delay by itself may not be a ground to take a sympathetic view.*
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> *15. In Maruti Udyog Ltd. Ltd. v. Ram Lal and Ors (2005) 2 SCC 638, it was observed that "While construing a statute, "sympathy" has no role to play. This Court cannot interpret the provisions of the said Act ignoring the binding decisions of the Constitution Bench of this Court only by way of sympathy to the workmen concerned.*

In A. Umarani v. Registrar, Co.op. Societies this Court rejected a similar contention upon noticing the following judgments : (SCC pp.131-32, paras 68-70)

> *"68. In a case of this nature this Court should not even exercise its jurisdiction under Article 142 of the Constitution of India on misplaced sympathy.*
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> *69. In Teri Oat Estates (P) Ltd. v. U.T. Chandigarh, it is stated : (SC p.144, paras 36-37)*
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> *'36. We have no doubt in our mind that sympathy or sentiment by itself cannot be a ground for passing an order in relation hereto the appellants miserably fail to establish a legal right. It is*

further trite that despite an extraordinary constitutional jurisdiction contained in Article 142 of the Constitution of India, this Court ordinarily would not pass an order which would be in contravention of a statutory provision.

37. As early as in 1911, Farewell, L.J. In Latham v. Richard Johnson & Nephew Ltd., observed : (All ER p.123 E)

"We must be very careful not to allow our sympathy with the infant plaintiff to affect our judgment. Sentiment is a dangerous will-o-the-wisp to take as a guide in the search for legal principles."

70. Yet again, recently in Ramakrishna Kamat v. State of Karnataka this Court rejected a similar plea for regularization of services stating : (SCC pp.377-78, para.7) :

"We repeatedly asked the learned counsel for the appellant on what basis or foundation in law the appellants made their claim for regularization and under what rules their recruitment was made so as to govern their service conditions. They were not in a position to answer except saying the the appellants have been working for quite for some time in various schools started pursuant to resolutions passed by Jilla Parishad in view of the government orders and that their cases need to be considered sympathetically. It is clear from the order of the learned Single Judge and looking to the very directions given, a very sympathetic view was taken. We do not find it either just or proper to show any further sympathy in the given facts and circumstances of the

case. While being sympathetic to the persons who come before the court the courts cannot at the same time be unsympathetic to the large number of eligible persons waiting for a long time in a long queue seeking employment.'"

16. In the facts and circumstances of this case, in our opinion, the High Court should not have allowed respondent herein to join his services only on the basis of sympathy.

17. It is now also well settled that in absence of any legal right, the Court should not issue a writ of or in the nature of mandamus on the basis of sympathy."

9. In view of the aforesaid decision, if the application is invited by the respondent authority and along with application, all the necessary documents not produced by the candidate, then, his application should not have to be considered by the respondent authority. Therefore, according to my opinion, recent decision of Apex Court, as referred above, and considering the facts of the present case that when respondent No.2 called the petitioner to produce the relevant original certificate along with application on 19.2.2007 and petitioners failed to do so, then, petitioner is not entitled to be considered as a candidate from employment exchange because prescribed period limit given by the respondent No.2 not complied with by the petitioner. Therefore, the decision which has been taken by respondent that application which was received after the over of the prescribed period, not accepted by the respondent No.2. For that, according to my opinion, respondent No.2 has not committed any error in rejecting such

application. The grievance which has been raised by learned advocate, Mr.Kanabar, that letter of 9.2.2007 received on 17.2.2007 and on 18.2.2007, there was Sunday, therefore, the petitioner was not able to get the original certificate back from Kachchh District. This difficulty should not have to be taken into account by this Court simply because it was petitioners' decision to submit an application at Kachchh District and nobody has directed to submit an application in Kachchh District. So action / decision of the petitioners if it is come in his way, this Court cannot help to the petitioner. So, the contention that sufficient time was not available to the petitioner to receive the original certificate from Kachchh District cannot consider to be ground to exercise the jurisdiction under Article 226 of the Constitution of India. Therefore, the respondent has given time sufficiently. 9.2.2007 letter informing the petitioner to apply with original certificate on 19.2.2007 in advance which was received on 17.2.2007. If there was no application made by the petitioner at Kachchh District, naturally, the petitioner to comply with the aforesaid letter dated 9.2.2007. Therefore, difficulty due to application made in Kachchh district. For that, only the petitioner is responsible and none of the respondent authorities are responsible. Therefore, the decision of the petitioner is come in his way. For that, Court is not able to help him while exercising the power under Article 226 of the Constitution of India. With regard to last contention about Section 4 of the Act which does not give mandate to the authority for being selected or appointed but, it only to the extent that it must have to be considered. The letter dated 9.2.2007 is sufficient document to prove that case of petitioner was considered after receiving the

name from employment exchange by the respondent No.2. Therefore, contention of Section of the Act is also rejected."

6. According to my opinion, petitioner has no legal right to have extension from the respondent s and also petitioner is not having any legal right to force the District Primary Education Officer, District Panchayat Nadiad to accept his application in absence of original certificates. In writ of mandamus, Article 226 is required on condition that there must be some legal obligations if observed by the respondents against the legal rights of the petitioner. Here, according to my opinion, both the things are absence; no legal rights of the petitioner and no legal obligations upon the respondents.

7. Therefore, in such circumstances, there is no substance in the present petition. Accordingly, present petition is dismissed.

Sd/-

[H.K. RATHOD, J.]

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